FTR Now

The Supreme Court of Canada Strikes Down Random Alcohol Testing Policy

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On June 14, 2013, the Supreme Court of Canada released its decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.* In this much anticipated decision, the Supreme Court clarified the law regarding random alcohol and drug testing in safety-sensitive, unionized workplaces, finding that universal random testing will only be permitted where employers can show "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace." In this *FTR Now*, we review the decision and its implications for employers.

THE POLICY

The employer, Irving Pulp & Paper Ltd ("Irving"), operates a kraft paper mill in Saint John, New Brunswick. The mill is a dangerous, safety-sensitive work environment, in which an incident could have significant adverse health and safety or environmental impacts.

In 2006, Irving unilaterally implemented a "Policy on Alcohol and Other Drug Use" (the "Policy"). The Policy included drug and alcohol testing for employees holding safety-sensitive positions within the workplace, but was significantly tailored to respect employee privacy concerns. For example, the Policy permitted the following forms of testing:

- reasonable cause testing where the Company had reasonable cause to suspect alcohol or drug use or possession in violation of the policy;
- testing following a significant incident or near miss in the workplace; and
- random testing as part of a return to work program after treatment for substance abuse.

In addition to random testing in the return to work process, the Policy also contained a universal random alcohol testing component (but not a universal random drug testing component). Under the universal random alcohol testing component, ten percent of the employees in safety-sensitive positions were to be randomly selected for unannounced breathalyzer testing over the course of each year.

The grievor was selected as part of this random testing. He had not consumed alcohol since 1979 and the breathalyzer test revealed a blood alcohol level of zero. The Union filed a grievance on his behalf, challenging the universal random alcohol testing aspect of the Policy only.

THE ARBITRATION DECISION

The grievance was heard by an arbitration panel chaired by Arbitrator Veniot. The majority of the arbitration panel found that the mill was an inherently dangerous work environment. Nevertheless, the majority also found that Irving needed to establish the need for random testing as a proportional response that balanced health and safety risks with employee privacy rights. In the result, the majority found that the universal random alcohol testing aspect of the Policy could not be justified.

On judicial review, the New Brunswick Court of Queen's Bench applied a standard of review of "reasonableness" and found that the arbitration decision was unreasonable in light of the dangerous nature of the workplace.

Upon further appeal, the New Brunswick Court of Appeal found that the determination by the arbitration panel that the mill was an inherently dangerous workplace was sufficient in itself to support a policy of universal random alcohol testing. Thus, the Court of Appeal agreed that the decision of the arbitration panel should be quashed, and Irving's Policy upheld.

THE SUPREME COURT DECISION

In a 6-3 decision, the Supreme Court of Canada reversed the decision of the Court of Appeal. On behalf of the majority, Justice Abella wrote that decision-makers ought to apply a "balancing of interests" approach when reviewing alcohol and drug testing policies in a unionized, safety-sensitive workplace. Under this approach, the employer's safety concerns must be balanced with the employees' rights to privacy.

The majority determined that the "blueprint" for dealing with drug and alcohol testing policies in unionized, safety-sensitive environments was outlined by Arbitrator Michel Picher in *Re Imperial Oil and C.E.P., Local 900* ("*Nanticoke*"). While the *Nanticoke* decision focused on drug testing, the majority applied the blueprint to its review of the universal random alcohol testing policy in this case. Based on the *Nanticoke* analysis, the majority endorsed the following principles in determining the reasonableness of an employer's drug and alcohol testing policy in a unionized, safety-sensitive environment:

- No employee can be subjected to random, unannounced alcohol or drug testing, except as part of an agreed rehabilitative program.
- An employer may require alcohol or drug testing of an individual where the circumstances give the employer reasonable cause to do so.
- Employers may require alcohol or drug testing following a significant incident, accident, or near miss where it may be important to determine the root cause of what occurred.
- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a substance abuse problem. As part of an employee's rehabilitation and return to work, workplace parties may agree that the employee undergo

random, unannounced drug or alcohol testing for a period of time.

The majority also referred to previous labour arbitration jurisprudence which found that universal random alcohol testing will be upheld as reasonable where the employer can demonstrate that there was a “general problem” with use or abuse of alcohol or drugs in the workplace. Nevertheless, on reviewing the evidence, Justice Abella also found that the arbitration panel reasonably concluded that Irving’s evidence of eight incidents of alcohol consumption on the job in fifteen years did not sufficiently demonstrate “enhanced safety risks” so as to justify the universal random alcohol testing component of the Policy.

As a result, the majority of the Court upheld as reasonable the arbitration panel’s decision that the adoption of a universal, random alcohol testing policy was an unreasonable exercise of Irving’s management rights under the collective agreement.

The dissenting justices approached the issue rather differently. In their view, the decision should have been reviewed with reference only to cases that had considered universal random alcohol testing. Those cases had determined that an employer should only have to lead evidence of **an** alcohol problem in a safety-sensitive workplace.

In the view of the dissent, the arbitration panel erred when it required Irving to show evidence of a **significant** alcohol problem, without any explanation for this higher evidentiary burden. The dissent also would have found that the panel drew an unreasonable inference from a key piece of evidence, further undermining the reasonableness of the decision.

IMPLICATIONS FOR EMPLOYERS

The *Irving* decision will have significant implications for employers who operate unionized, safety-sensitive workplaces, and who wish to implement drug and alcohol policies incorporating some form of universal random testing.

The majority’s endorsement of the *Nanticoke* decision as providing a “blueprint” for its analysis suggests that employers’ policies can continue to provide for some types of alcohol and drug testing:

- reasonable cause testing;
- testing following a significant incident or near miss in the workplace; and
- random testing as part of a return to work program after treatment for substance abuse.

Such testing should be permitted as part of a policy that incorporates principles of health and safety, prevention, accommodation and rehabilitation.

However, because of the way that the majority framed its analysis – focusing on both alcohol and

drug testing generally in unionized, safety-sensitive workplaces – the *Irving* decision affirms that universal random drug or alcohol testing will be permissible in only very limited circumstances.

In the usual case, an employer will need to show something more than just the inherent safety risks in the workplace. The majority's reasons strongly suggest that the "enhanced safety risks" will typically relate to a sufficiently serious drug or alcohol problem in the workplace, and especially one that persists despite an employer's attempts to manage it.

It is interesting to note that the majority did leave open the possibility that the nature of some workplaces may permit random testing based on the inherent danger in the workplace itself, but also suggested that this would only occur in "extreme circumstances". As stated by the majority:

Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny.

In terms of non-unionized workplaces, the implications of the *Irving* decision are less clear. At the outset of its reasons, the majority found that the principles applied under human rights statutes to testing in non-unionized workplaces did not provide much assistance for the analysis undertaken by arbitrators in unionized workplaces which involves balancing competing privacy and safety interests.

Since many of the non-union cases have arisen under human rights legislation, they entail an analysis of whether a policy is discriminatory, typically on the basis of disability. The question of whether such policies are discriminatory is not entirely settled in light of case law developments since the *Entrop* decision. What remains to be seen is whether the analytical framework applied in the unionized context will begin to be applied more regularly in the non-union context in an attempt to develop a more consistent analytical approach to testing.

Finally, it should be noted that the Supreme Court did not address the question of pre-employment testing, an issue that has been the subject of previous decisions that are not always easy to reconcile.

Employers with drug and alcohol policies should review those policies in light of the *Irving* decision to ensure that they are consistent with the principles endorsed by the Supreme Court.

Should you require any information about this decision and its implications for your workplace, please contact Kathryn J. Bird at 416.864.7353 or your regular Hicks Morley lawyer.

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